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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1446 110

ALLEN POPE,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

ALLEN POPE,
Pro se.

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THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above entitled case, its Docket No. 46476.

Opinion Below

The opinion of the Court of Claims (R. 34) is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered December 2, 1946 (R. 39). Motion for new trial was overruled March 3, 1947 (R. 39). The judgment of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented

The questions presented are:

1. Whether petitioner whose contract is based upon Articles 3 and 4 of the Government Standard Form of Contract may be deprived of the benefit thereof when he has performed in good faith and complied with all the requirements of his contract.

2. Whether, in the contract in suit, the contract price for the work shown on the plan is $2500.00.

3. Whether, under the contract in suit, the petitioner is entitled to be paid at cost for the additional work performed pursuant to respondent's order enlarging the slopes of the embankment.

4. Whether the lower court properly refused to make special findings of facts responsive to the petition.

5. Whether under the actual circumstances, the 20 cent unit rate is applicable to any part of the work, the location of the embankment not having been designated so as to require more fill.

Statement

In summary the substance of the case below was thus: The parties made contract on government standard forms for the construction of an embankment having specified slopes. Articles 3 and 4 of said standard form, among other contract provisions, provided for changes in plan with corresponding adjustments in the cost and time actually incurred. Respondent ordered the slopes modified and required petitioner to construct the embankment accordingly, thereby necessitating the placement of double the amount of fill originally contemplated. The cost of the additional work was aggravated by requiring it to be done

in cold weather. The respondent enforced a settlement on the basis of the contract unit rate, the application of which was strictly limited to certain sub-fill as will be explained hereinafter. Petitioner, in turn, appealed to the contracting officer and to the Secretary of the Navy without avail. Petitioner sued below for the difference between cost and payment. The lower court held that respondent had authority to adjust changes in elevation on the basis of the unit bid price. It disregarded completely the fact that the increased work was caused by change in slope, not by change in height. It disregarded the contract provisions covering changes in the work planned and went so far as to decline to make any findings in such respects. It dismissed the petition and ordered petitioner to be assessed the costs. Whence, the principal issue sought to be brought here is whether petitioner may be deprived by the Court of Claims of benefit of his contract rights for adjustments on the basis of the standard contract provisions, and, further, whether the lower court may continue its frequent practice of refusing to make findings responsive to petitions and thus dismiss petitions leaving the claimant virtually without recourse.

More in detail and with statements cited to the record the following amplification is given: The petitioner, under a contract with the United States drawn on government standard forms, constructed an earth embankment on the Rifle Range at the Naval Academy, Annapolis, Maryland (R. 1-12; R. 25-34). The embankment was agreed to be constructed complete and in strict accordance with a detailed drawing, which, taken with the warranty of spec. par. 2-01 (R. 7), delimited precisely the amount of work to be done (Art. 1. R. 2, R. 26: Contract drawing appended p. ii). The advertisement called for a unit price bid, but petitioner qualified his unit bid so that the work would be constructed complete and in the location shown on the

drawing for $2500.00 (R. 26). This qualification was made in conformance with Standard Bid Form No. 21 and Bureau Bidding Instructions which required any intended conflict with the advertised specifications to be set out in a designated place on the bid form (Spec. par. 3-02, R. 9). The Bureau of Yards and Docks accepted the proposal and formally incorporated the qualification into the contract (Finding 4, R. 26). The location of the embankment was given exactly on the drawing but specification par. 1-03 stated that the said location was approximate, that the exact location would be given by the officer in charge (R. 5). In the event that the location were moved towards the creek, an increase in the amount of sub-fill would be required over what was shown on the plan. This increase would have been in accordance with the specifications, however, and the 20 cent unit rate would apply. With the elevation of the ground warranted by spec. par. 2-01 (R. 7) and the mean elevation so found to be + 19.50; with the elevation of the top given as +48.00 and its width and length as 10 feet and 190 feet respectively; and with the bank slopes fixed in the proportion of 12 vertical to 10 horizontal, or 120%, all factors controlling the volume were established. Such volume was determined to be about 8000 cubic yards as measured in the embankment. The original advertisement proposed to pay on the basis of borrow pit measure (Spec. par. 2-05, R. 28). Since the compacting required was very light, the "swell" from borrow pit to finished embankment was about 15% and the net yardage, borrow-pit measure, for constructing the embankment as shown and in the location given on the plan was therefore 7000 cubic yards (Spec. par. 2-04, R. 8). This was the work shown for which $2500.00 was to be paid. Sub-fill in addition thereto but within the requirement of the specification would be paid for at the unit rate of 20 cents. Such latter sort of adjustment would operate in event the amount were less

rather than more. The plan indicated no prospect of less material being required because, other than towards the creek, the ground was substantially flat (Dwg. p. ii).

If, in addition to the foregoing work shown on the plan, it was desired to change the requirements, or conditions were found different than depicted requiring modification of the plan, resultant work ordered was agreed to be adjusted for on the bases of time and cost involved by Articles 3 and 4 of the Standard Contract and paragraph 27 of the General Provisions (R. 3, 4, 11). Respondent, by reason of the fact that the earth required to be used for fill would not stand at the slope designated, ordered such changes by altering the slope from 12 vertical: 10 horizontal, or 120%, to the reverse ratio of 10 vertical: 12 horizontal, or 83% (R. 29-30). This change more than doubled the amount of earth to be placed, 13,776 cubic yards according to respondent, 14,542 cubic yards according to petitioner (R. 32). Petitioner requested adjustment on the basis of cost in accordance with Articles 3 and 4 and Gen. Prov. par. 27 (R. 32-34). Respondent's officer-in-charge proposed settlement on the basis of the unit price (R. 33). Petitioner appealed in turn to the contracting officer, the Chief of the Bureau of Yards and Docks, and to the Secretary of the Navy, but without avail (R. 33). Respondent issued a change order covering the additional work based upon the unit price (R. 33). Petitioner accepted the payment offered with a qualified release (R. 33).

The cost of the additional work was aggravated by the period of time required for performance: The contract was executed June 27 with an agreed time of performance of 90 days after notice to proceed (R. 2). Certain interruptions were contemplated but it was agreed that performance would be allowed at all other times and at night (R. 7, R. 11). It was expected that the work would be performed during the summer months. Petitioner so pre-

pared and supplied all necessary equipment and requested to be allowed to perform. Respondent refused to perform its precedent work of taking elevations and of giving lines and grades for the location of the work and refused repeatedly to permit petitioner to perform until August 31, when notice to proceed was given (R. 28). This date operated to fix the agreed date of completion as November 29 (R. 28). Respondent, however, ordered enlargement of the embankment on September 8 and did not fix the location until September 12 (R. 29-30). Thereafter, it further interrupted the work by rifle fire on 26 working days. The total delay after June 27 was 103 days as against the agreed time for performance of 90 days. Petitioner finished all of the work on December 22, or 178 days after the date of the contract, i.e., within a working period of 75 calendar days (R. 30, 31, 33). On November 24 a snow storm occurred inaugurating a period of freezing weather. At this time petitioner had placed far more fill than originally contemplated. Respondent ordered petitioner to procure heavier equipment in order to complete the work. The cost of the additional work was more than it would have been had respondent permitted earlier performance. Regardless of the time of performance, however, petitioner claimed the actual cost in giving his release (R. 33).

Petitioner sued in the Court of Claims which dismissed his petition, the court having refused to make findings of even the barest essentials upon which petitioner relied, e. g., the contract provisions or the contract drawing. Instead it opened its decision with the statement, "The facts necessary to a decision of the case are set out in the opinion; they are set out more in detail in the following special findings of fact" (R. 25). The lower court even refused on motion for new trial to make findings of these and other undisputed facts which were the bases of petitioner's claim (R. 39). The court below rested its decision upon a

certain expression on the contract drawing, "Elevation ± 48.00," as authority for changing the height of the embankment. The court is believed quite in error in its interpretation, but, whether right or wrong, change in elevation of the top of the embankment has virtually nothing to do with the claim here made which pertains to change in slopes thereby enlarging the width and length of the base and thus more than doubling the volume, which circumstance is plainly apparent from the sketch opposite. Respondent's computation of the total volume placed was 13,776 cubic yards (R. 31). If the top had been raised to elevation plus 50 as ordered (R. 30), or two feet higher than the original plan showed at plus 48, the computation of the volume due to increased height would be 2 feet deep by 8 feet average width by 190 feet length divided by 27 cubic feet in one cubic yard or 112 cubic yards. In other words, the yardage due to change in slope was 13,664 cubic yards as compared with 112 cubic yards due to change in height. The specification of errors to be urged as given immediately hereinafter supplies further summary of the action below, particularly relative to matters of law.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In failing to adjust payment for additional work performed pursuant to respondent's order modifying the slopes of the embankment on the basis of Government Standard Articles 3 and 4 and paragraph 27 of the General Provisions all of which were part of the contract and required adjustment to be made on the basis of the actual cost involved.

2. In holding that petitioner was only entitled to be paid at the rate of 20 cents per cubic yard for the additional work performed.

3. In failing to order payment of $2500.00 for the amount of fill required by the original contract plan (which amount was 7000 cubic yards borrow-pit measure).

4. In holding that petitioner was only entitled to be paid at the unit rate of 20 cents per cubic yard for the work shown on the original plan (7000 cubic yards borrow-pit measure).

5. In holding that authorization to vary elevation of the top of the embankment (if there were such) was license to change the slopes and to require performance at the unit bid price.

6. In holding that petitioner was required to perform additional work at his cost and peril at any season of the year when the obvious intendment of the original contract was for performance of the contemplated contract work during summer weather.

7. In failing to hold that the additional work performed was due to change in slope, not change in height.

8. In failing to find the cost of the additional work.

9. In failing to find the facts responsive to the petition, e. g., the contract.

10. In failing to render judgment for the claim.

11. In refusing to allow petitioner to explain on oral rebuttal the meaning of the phrase, "Elevation ± 48.00", after respondent had made vigorous but erroneous interpretation, and thereafter the court adopted respondent's interpretation as basis for its decision.

Reasons for Granting the Writ

1. The court below has decided a Federal question of substance, i. e., the meaning of express terms of a Govern-

ment Standard Contract, in a way believed not in accord with applicable decisions of this Court.

2. The decision of the court below is erroneous and in conflict with a substantial list of earlier decisions in what should be regarded as elementary and settled law on the subject.

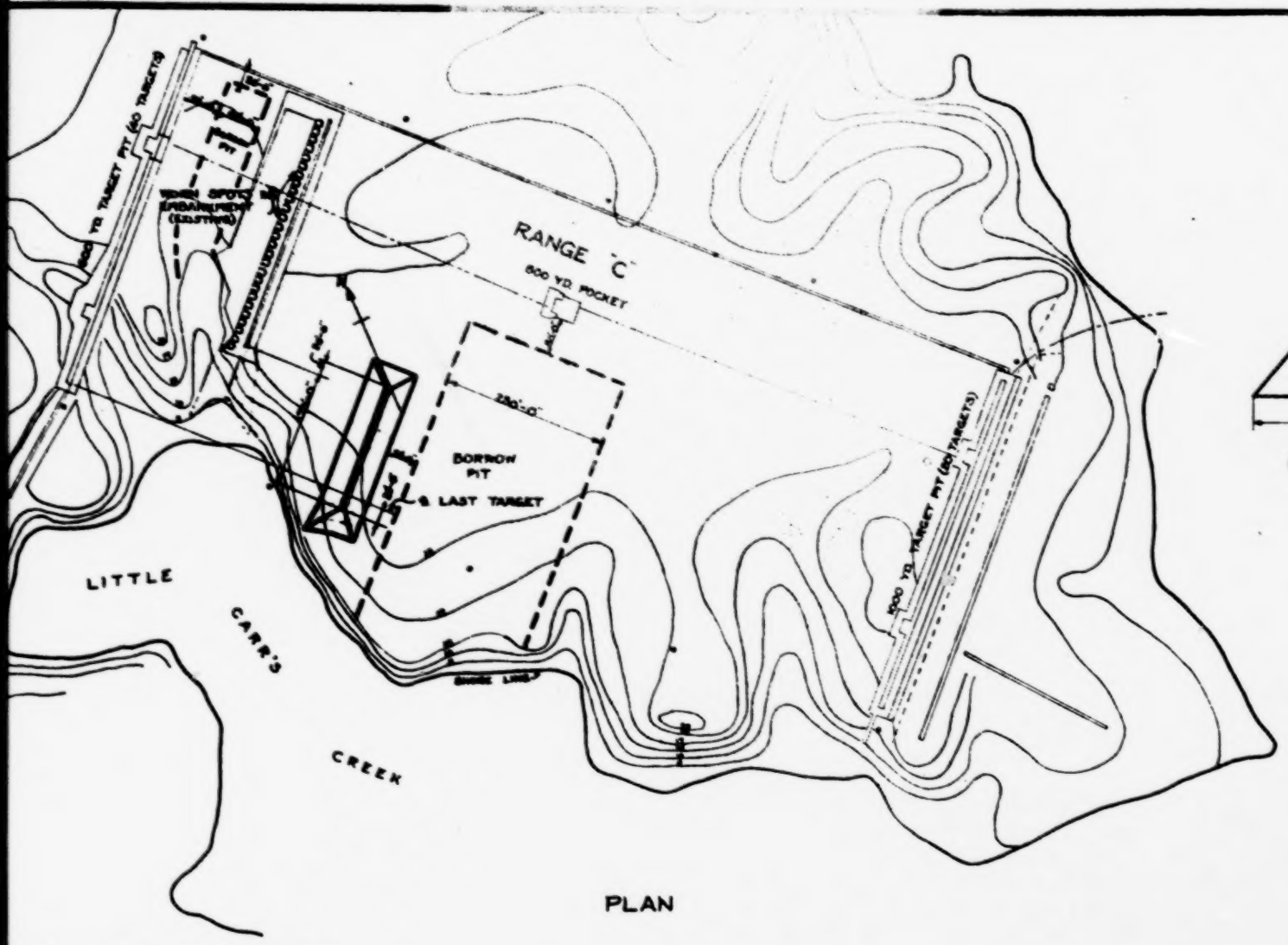
3. The questions presented are of wide importance, especially so to every Government contractor, to the bar and to the lower courts.

4. The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Conclusion

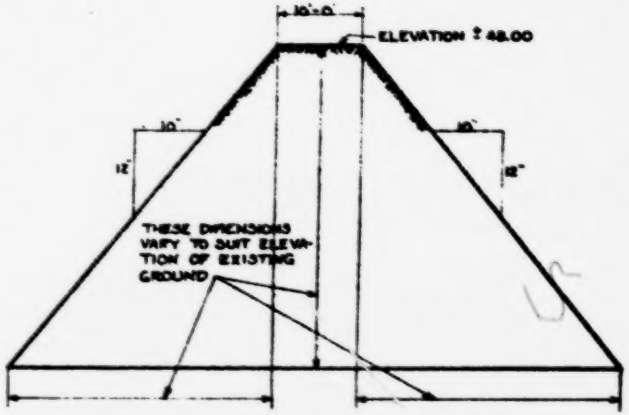
For the foregoing reasons it is respectfully submitted that this petition should be granted.

ALLEN POPE,
Pro se.



PLAN

NOTE: LIGHT LINES DENOTE EXISTING WORK.
HEAVY LINES DENOTE NEW WORK.



CROSS-SECTION OF EMBANKMENT
SCALE:- 1/8"=1'-0"

SCALE IN FEET

Checked By:
Chief Draftsman:
Profile Plotted:
Cross Sections Plotted:

Navy Department Bureau of Yards & Docks
Approved: June 8th 1938.
Chief of Bureau

Drawn By:
Traced By: D.R.U.
Checked By:
Chief Draftsman:

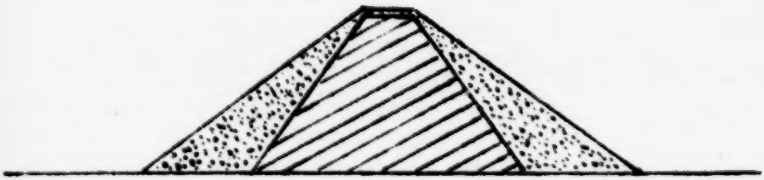
BUILDINGS & GROUNDS
U.S. NAVAL ACADEMY
ANNAPOLIS, MD.
EXTENSION TO 600 YD. RANGE
EMBANKMENT
RANGE C — RIFLE RANGE

Approved: June 6th, 1938.
Lieut. Comdr. (C.E.C.) Officer in Charge
Public Works Contracts

Sheet 1 of 1 Accompanying Specification No. 8796

Y&D Drawing No. 127243

Naval Academy No. 5896



CROSS-SECTION OF EMBANKMENT

Cross-hatched portion represents work as planned
Dotted portion represents additional fill as placed